

ALASKA STATE LEGISLATURE
HOUSE STATE AFFAIRS STANDING COMMITTEE
Anchorage, Alaska
October 6, 2020
1:00 p.m.

MEMBERS PRESENT

Representative Zack Fields, Co-Chair
Representative Jonathan Kreiss-Tomkins, Co-Chair (via
teleconference)
Representative Andi Story (via teleconference)
Representative Steve Thompson (via teleconference)

MEMBERS ABSENT

Representative Grier Hopkins
Representative Sarah Vance
Representative Laddie Shaw

COMMITTEE CALENDAR

PRESENTATION: STATE PROCUREMENT AND CONTRACTS

- HEARD

PREVIOUS COMMITTEE ACTION

No previous action to record

WITNESS REGISTER

BARRY JACKSON

Anchorage, Alaska

POSITION STATEMENT: Provided a PowerPoint presentation,
entitled "Presentation on Procurement and Contracts," dated
10/6/20.

EMILY NAUMAN, Deputy Director

Division of Legal and Research Services

Legislative Affairs Agency

Anchorage, Alaska

POSITION STATEMENT: Answered questions during the presentation
on state procurement and contracts.

JAMES BALDWIN, Attorney

Juneau, Alaska

POSITION STATEMENT: Testified during the presentation on state procurement and contracts.

ROSS KOPPERUD
Palmer, Alaska

POSITION STATEMENT: Testified during the presentation on state procurement and contracts.

ACTION NARRATIVE

[1:00:54 PM](#)

CO-CHAIR ZACK FIELDS called the House State Affairs Standing Committee meeting to order at 1:00 p.m. Representatives Thompson (via teleconference) and Fields were present at the call to order. Representatives Story (via teleconference) and Kreiss-Tomkins (via teleconference) arrived as the meeting was in progress.

PRESENTATION: State Procurement and Contracts

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CO-CHAIR FIELDS announced that the only order of business would be a presentation on state procurement and contracts by Barry Jackson, retired state procurement officer.

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BARRY JACKSON informed the committee that he is a retired state procurement officer with 30 years of experience in the Department of Administration's (DOA's) statewide procurement functions. While working for the state, Mr. Jackson said he functioned as an assistant purchasing agent; purchasing agent I, II, and III; and the state contracting and facilities manager. He said during that time, he conducted thousands of competitive sealed bids and competitive sealed proposals. He continued to provide a short history of his work experience, which included negotiating the purchase of the Robert B. Atwood Building in downtown Anchorage to consolidate state offices. He noted that during his tenure as a state employee, he served as president of the Alaska Public Employees Association (APEA) and as a chief negotiator of the first collective bargaining agreement for the General Government Bargaining Unit. Later, he was the campaign chairman for the successful effort to separate the general government employees bargaining unit from APEA, which initiated the Alaska State Employees Association (ASEA). After

retirement, Mr. Jackson said he was hired as an IT developer and project manager for multimillion-dollar contracts with firms such as BP, ConocoPhillips Alaska, ENSTAR Natural Gas Company, and Chugach Electric Association. He added that he is qualified to examine state contracts; IT practices; and labor, employment, and personnel issues.

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MR. JACKSON provided a PowerPoint presentation, entitled "Presentation on Procurement and Contracts." He directed attention to slide 2, which indicated that the request for proposal (RFP) 2020-0200-4381 was developed and conducted with severe faults, including [original punctuation provided]:

- illegal specifications
- unduly restrictive responsiveness requirements
- irrelevant required services
- suppression of competition
- failure to preserve critical public records
- contract execution in willful violation of a clear due process statutory restraint
- contract execution despite the lack of statutorily required licensing

MR. JACKSON directed attention to slide 3, which highlighted Alaska case law from McBirney & Associates v. State of Alaska, which read as follows [original punctuation provided]:

The state has an established procurement process which includes competitive bidding. The purposes of competitive bidding are to prevent fraud, collusion, favoritism, and improvidence in the administration of *1136 public business, as well as to ensure that the [state] receives the best work or supplies at the most reasonable prices practicable. ... [T]he requirement of public bidding is for the benefit of property holders and taxpayers, and not for the benefit of the bidders; and such requirements should be construed with the primary purpose of best advancing the public interest.

MR. JACKSON said the case law provides a heightened understanding of why Alaska puts competition first and foremost in public procurement. He explained that [competitive bidding] should be conducted with absolute fairness, adding that it's vitally important that the citizens of Alaska have confidence in

the expenditure of state funds. He continued to slide 4, which provided the following quote from the State of Alaska Procurement Manual [original punctuation provided]:

The State of Alaska has several procurement methods available to ensure that when an agency acquires goods or services, they are procured at the best possible cost to meet the needs of the agency while promoting fair and open competition and protecting the interests of both the state and the vendors.

MR. JACKSON explained that the state is generally interested in getting the best price while vendors are interested in having a fair opportunity to compete for the state's business. Slide 5 highlighted additional text from the procurement manual, which read as follows [original punctuation provided]:

Competition is important to both the state government and the vendor community in that it encourages not only better pricing and value, but also fairness, transparency, and innovation. ... Regardless of the procurement method used, how an agency describes what they need can also affect competition. In general, this description - referred to as the specification - should be written to allow as much competition as possible.

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MR. JACKSON continued to slide 6. He explained that RFP 2020-0200-4381 was intended to be the means by which the APEX project was undertaken and the beginning of its early operational pilot program. The RFP was issued on September 19, 2019 with Commissioner Kelly Tshibaka as the project manager. He stated that one section of the RFP, the prior experience clause, contains all the difficulties that were encountered and reviewed. Slide 7 provided part of Section 1.04, which read as follows [original punctuation provided]:

SEC. 1.04 PRIOR EXPERIENCE

"Offerors must have experience in strategy, planning, and implementation of large-scale government shared services or Information Technology consolidations. All Offerors must be a member of the National Governors Association Partners (NGA Partners), or a firm that offers all the following services in-house (without

subcontracting): professional services, audit, assurance services, taxation, management consulting, advisory, actuarial, corporate finance and legal services. Offerors must have been in business as a company in good standing for at least 25 years.

An offeror's failure to meet these minimum prior experience requirements will cause their proposal to be considered non-responsive and their proposal will be rejected."

MR. JACKSON directed attention to slide 8, which highlighted issues with the first sentence of Section 1.04, "Offerors must have experience in strategy, planning, and implementation of large-scale government shared services or Information Technology consolidations." He explained that the placement of "or" creates two options: the opening sentence allows potential offerors to have experience in strategy planning, implementation of large-scale government shared services or experience in information technology consolidations. He said in contracting law, ambiguities are held against the author of the specification, which, in this case, is the State of Alaska.

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MR. JACKSON continued to slide 9, which exhibited a flow chart that mapped the issues with the prior experience clause. Essentially, he said, there are numerous combinations that result in a PEC evaluation, adding that "any modest failure stops you in your tracks." Slides 10-11 addressed the requirement that "all Offerors must be a member of the National Governors Association Partners (NGA Partners)." He noted that he had never seen such a requirement. Furthermore, he reported that NGA partners are corporate donor organizations with no particular specialty or expertise. He speculated that any of the donor companies, including Walmart, Land O' Lakes, Toyota, and Hyundai, could have met the "IT consolidation experience" requirement, the "NGA experience" requirement, and the "in business 25 years and in good standing" requirement. He reiterated that those companies could have met the previous experience clause because of their NGA membership without being able to provide any "worthwhile" assistance regarding the contract.

MR JACKSON turned attention to slide 12 and noted that BDO, one of the contract bidders that could not claim membership in the NGA, performed the audit for the NGA in 2019. Slide 13, which

addressed procurement specifications in Alaska statutes and regulations, read as follows [original punctuation provided]:

AS 36.30.060

(c) The commissioner may obtain expert advice and assistance from personnel of using agencies in the development of specifications. Specifications must promote overall economy for the purposes intended and encourage competition in satisfying the state's needs and may not be unduly restrictive. The requirements of this subsection regarding the purposes and nonrestrictiveness of specifications apply to all specifications, including those prepared by architects, engineers, designers, and other professionals.

2 AAC 12.090 - No unduly restrictive specifications

Except for specifications relating to procurements under 2 AAC 12.400(b), all specifications must describe the requirements to be met without having the effect of exclusively requiring a proprietary supply, service, or construction item, or procurement from a single source, unless no other manner of description will suffice.

2 AAC 12.790 - No restrictive terms and conditions

Contractual terms and conditions may not have the effect of unnecessarily limiting competition or exclusively requiring a proprietary supply, service, or construction item or procurement from a single source unless no other requirements will suffice.

MR. JACKSON pointed out that AS 36.30.060(c) emphasizes the need for specifications to encourage competition, satisfy the state's needs, and may not be unduly restrictive. He explained that specifications cannot provide for a service or product that "is there for the purpose of slimming down the competition that is not actually going to be used or performed." He said the same applies to restrictive terms and conditions in reference to the "25-year issue."

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MR. JACKSON slide 14 displayed an opinion from the Division of Legal and Research Services, LAA, which questioned the appropriateness of including the NGA partnership requirement in the RFP. Slide 15 examined a proposed amendment to the RFP, in which at least one bidder asked if the NGA membership requirement could be altered from a paid association membership to a requirement based on relevant work experience. Rather than explaining how NGA membership offers advantage to the State of Alaska and the public interest, the state denied the request. Other potential offerors requested an extension for the period of solicitation to allow time for them to join the NGA, but they were also denied. Slide 16 reexamined the prior experience clause, highlighting the "or" in the second sentence, " All Offerors must be a member of the National Governors Association Partners (NGA Partners), or a firm that offers all the following services in-house (without subcontracting): professional services, audit, assurance services, taxation, management consulting, advisory, actuarial, corporate finance and legal services."

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MR. JACKSON turned attention to slides 17-18 and analyzed the aforementioned in-house services in terms of their usefulness regarding the solicitation. He questioned why "in-house" services are critical to the RFP and why a bidder would be denied for having in-house services as opposed to subcontracting services. Furthermore, he questioned how the nine services - professional services, audit services, assurance services, taxation services, management consulting services, advisory services, actuarial services, corporate finance services, and legal services - connect to the purpose of the RFP. He indicated that all nine requirements are generic, ill-defined, and unduly restrictive.

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MR. JACKSON directed attention to slide 19, which highlighted AS 36.30.015(d) and 2 AAC 12.040 as follows [original punctuation provided]:

(d) An agency may not contract for the services of legal counsel without the approval of the attorney general. An agency may not contract for the services of a hearing officer or administrative law judge for an administrative, quasi-judicial hearing without the approval of the attorney general and the chief

administrative law judge of the office of administrative hearings (AS 44.64.010).

2 AAC 12.040 - Procurement of legal counsel

An agency may not contract for the services of legal counsel without the prior written approval of the attorney general. Contracts for the services of legal counsel may incorporate clauses for adjustments in prices, time of performance, and total dollar amount.

MR. JACKSON continued to slide 20, which displayed the open records request he made in search of the prior written approval of the attorney general to contract for the legal services stipulated in the RFP. He received a response stating that no record matched the records description listed, indicating that no prior approval exists. Slide 21 addressed the purpose of the attorney general's prior written approval for any contractor to provide "legal services" on behalf of the state. He cited Article 18 from the Alvarez & Marsal contract, which read:

Firm will not be prevented or restricted by virtue of providing the services under this agreement from providing services to other entities or individuals, including those whose interests may be in competition or conflict with the State of Alaska's, provided Firm discloses the conflict, the state consents, and the contractor makes appropriate arrangements to ensure that the confidentiality of information is maintained.

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MR. JACKSON directed attention to slides 22-24, which addressed the requirement that "offerors must have been in business as a company in good standing for at least 25 years" from the prior experience clause. Slide 25 exhibited one of the RFP draft edits, in which Commissioner Tshibaka inserted the words "in good standing" and "25 [years]". He speculated that Commissioner Tshibaka was writing the restrictive specifications; however, he noted that the commissioner's degree of involvement in drafting the entire prior experience clause is unknown because previous drafts were unattainable. Slide 24 read as follows [original punctuation provided]:

IT 25 years ago in 1995

- Browser war was between Netscape and Microsoft Internet Explorer
- DVD introduced
- Java 1.0 introduced
- Javascript developed
- World Wide Web is beginning to grow quickly (36 million users vs. today's 4-5 billion)
- CompuServe and AOL are the major online services
- First Sony Playstation
- Windows 95 launched (first of new generation Operating Systems)
- Amazon.com opens
- HTML 2.0 is new standard; we are now on HTML 5

How are these relevant to today's IT capabilities and design and development needs?

Why is 25 years in business and in good standing an essential requirement to meeting the needs of the work described by this RFP? It suppresses modern competitors.

MR. JACKSON surmised that if a bidder would have been denied for having only 24 years and 11 months in business as a company in good standing because the requirements cannot be negotiated or reviewed. He continued to slide 25, which readdressed the missing draft versions of the RFP that were "identified, described, and withheld on deliberative process privilege on [April 27, 2020]." He opined that effort has not been put forth to find the missing documents.

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MR. JACKSON turned attention to slide 26 and stated that the overall result is suppression of competition through the use of the prior experience clause. He said the only Alaska offeror, BDO, was disqualified solely on the basis of not including the words "legal services" in their offer. He noted that BDO's offer was \$400,000 less than Alvarez & Marsal's. Furthermore, by disqualifying BDO, the Alaska offeror was denied the points scoring benefits of 20 percent for the lowest cost, the Alaska bidder preference of 5 percent, and the Alaska offeror preference of 10 percent of points. He conveyed that whether intended or not, the only Alaska offeror was denied the benefits of being a qualified Alaska business. He opined that the restrictions preventing BDO from being considered were illegally included in the RFP. Slide 27 displayed emails from and to

Commissioner Tshibaka regarding the RFP. In the emails, participating businesses, including Asante Alliance, requested a deadline extension; however, the commissioner denied the requests without further discussion.

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MR. JACKSON continued to slide 28, which read as follows:

The effect of the prior experience clause was to preclude bidders:

- who were not Partner members of NGA, an unaffiliated, irrelevant, voluntary organization, or
- who could not offer the nine in-house services stipulated by section 1.04.
- in so doing, it also eliminated the only Offeror who could receive the scoring benefits of the lowest cost, the Alaska Bidder's Preference, and the Alaska Offeror's Preference.

Further attempts by bidders to compete by becoming members of NGA were denied on the basis of lack of time; there were at least 2 requests to extend the bidding period. Both requests were denied.

The result was that when bids were opened, there was only 1 responsive bidder.

MR. JACKSON turned attention to slide 29 and explained that BDO filed a formal protest, which was denied. Subsequently, BDO appealed, followed by DOA's final decision to deny the appeal. He noted that the State of Alaska did not inform BDO that legal services inappropriately listed among the nine required services in the prior experience clause. He surmised that had legal services not been included, BDO's offer would have been acceptable.

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MR. JACKSON continued to slide 30, which highlighted AS 36.30.365 [notice of intent to award a contract]. He stated that AS 36.30.365 requires that the notice of intent to award is issued to all offerors at least 10 days prior to the formal award of a contract. He reported that in this case, the contract was signed during that ten-day period; consequently, the state eliminated BDO's chance of being awarded the contract,

should they have won the protest. Slide 31 provided a copy of BDO's official protest. The protest indicated that Section 1.04 - the prior experience clause - had ironclad consequences: those who did not list legal services in prior experience were excluded. BDO pointed out that "legal services" is mentioned nowhere else in the RFP, other than Section 1.04 and Section 4.04. Slide 32 examined DOA's protest response, which explained that BDO listed all other services except legal services. DOA maintained that BDO's failure to include legal services prevented the bid from being considered at all because it gave the prior experience clause a pass/fail criterion. Slide 33 addressed BDO's protest appeal to Dave Donley, DOA's deputy commissioner. The appeal noted that legal services were never addressed in any other section of the RFP and seem unrelated to the work. Slide 34 detailed the state's final decision, which reiterated that the inclusion of legal services was a requirement; further, that failure to include legal services in the offer resulted in BDO's rejection. Mr. Jackson explained that by declaring the appeal as a matter of law, and facts not in dispute, the state avoided an independent administrative hearing, and therefore, further scrutiny of an irregular bidding process. He pointed out that after the appeal was denied, BDO's only option would be a Superior Court hearing or for the Superior Court to refer the case back to the Office of Administrative Hearings (OAH), DOA. He noted that BDO elected not to pursue the matter further. Nonetheless, he said that had the appeal been properly referred to OAH, many of the questions at hand would have been addressed.

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MR. JACKSON explained that a majority of funds appropriated for the operation of state government and the conduct of its day-to-day business are spent through the state's procurement system. He emphasized the system is purposely constructed to acquire goods, services, and supplies fairly and economically in a manner that promotes the public interest. He reiterated that fair competition is the keystone to promoting confidence and the public interest. He stated that examination of several recent large procurements revealed that faults exist. He expressed his concern that a pattern is emerging, which indicates that the state's procurement function is being utilized in a manner that demotes confidence and the public interest and promotes malfeasance. He opined that recent procurement misconduct demands continuing examination and oversight.

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MR. JACKSON directed attention to slide 35, which read as follows [original punctuation provided]:

The State's Procurement function is being utilized to direct State funds toward friends and favored parties through pressure; manipulation of Statutes and Regulations; willful ignorance of procurement laws and standards; and outright deception directed towards career procurement officials for the purpose of obtaining a desired outcome.

- Alvarez & Marsal (\$5,000,000).
- Tandem Motion (\$15,000,000).
- API -Wellpath (\$140,000,000).
- Microsoft Azure Cloud Usage work with no contract (\$15,000,000).
- AIDEA Clark Penney contract (\$400,000).
- Emergency RAP allowing unrestricted contracting (\$3,000,000).
- Microsoft Memorandum of Understanding with OIT for free work on Azure Cloud.
- Removal of former CPO after threatening to reduce salary if reappointed.
- Hiring of new CPO at \$70,000 higher salary than previous CPO.
- Use of State letterhead for multiple favorable recommendations by Commissioners and other highly placed partially exempt appointees to influence the award of a multi-million-dollar State contract to a favored Offeror in what was supposed to be a competitive bid process.

MR. JACKSON urged the legislature to take appropriate action to encourage confidence among the citizens of Alaska in the state procurement system.

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The committee took a brief at-ease.

[2:19:55 PM](#)

REPRESENTATIVE THOMPSON opined that the presentation was informative, but one-sided. He asked if the committee is performing a "witch hunt" and expressed his concern that Mr. Jackson is working with reporter Dermot Cole in an attempt to gather information. Nonetheless, he acknowledged that there are existing problems in the state's procurement system that need to be addressed.

REPRESENTATIVE FIELDS noted that the administration was invited to answer questions and address some of the issues raised by Mr. Jackson, but they declined to participate. He asked Mr. Jackson if he is associated with media or offerors engaged in the solicitation.

MR. JACKSON said he is not associated with any of the offerors.

[2:21:28 PM](#)

CO-CHAIR KREISS-TOMKINS questioned whether Mr. Jackson has seen any procurement precedence similar to what was described in the presentation during his service in state employment or since then.

MR. JACKSON answered no. He opined that making use of the NGA membership - an organization that requires a fee to join - as a requirement of the specification is "so far off the normal path that it's stunning."

CO-CHAIR FIELDS said he shares Mr. Jackson's concern that the NGA membership essentially becomes "pay to play," an outcome that is not appropriate for the procurement process.

[2:22:54 PM](#)

REPRESENTATIVE STORY asked why the state converted to a more thorough procurement process in 1988.

MR. JACKSON explained that from 1984-1986 there was a procurement and subsequent grand jury investigation regarding a transaction under the Sheffield administration attempted to restrict the bidding boundaries for an office building to favor a friend and contributor to the governor. After the grand jury

investigation and potential impeachment action, the legislature considered ways to improve the procurement process and decided on the model procurement code of the American Barr Association, a key portion of which is the establishment of a chief procurement officer who is intended to be the ultimate authority with regard to procurement organization and decision making in the State of Alaska. He noted that the position was established as a six-year position in partially exempt service that could only be discharged for cause.

REPRESENTATIVE STORY expressed concerned about the information that was shared today. She offered her belief that there is a lack of understanding in regard to the procurement process. She expressed her appreciation for the recommendation to form a special committee on procurement. She emphasized the importance of state dollars going towards local business that provide necessary services.

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CO-CHAIR FIELDS stated that the procurement process is in the jurisdiction of the House State Affairs Committee, which is why the committee is holding this hearing. He inquired about the recourse for someone making a records request under the Public Records Act when DOA claims the records do not exist.

MR. JACKSON offered his understanding that if DOA asserts that the record does not exist, the citizen or government operative who made the public records request cannot pursue the matter through to its conception.

CO-CHAIR FIELDS directed the same question to Emily Nauman.

[2:30:05 PM](#)

EMILY NAUMAN, Deputy Director, Division of Legal and Research Services, Legislative Affairs Agency (LAA), said she does not know the answer. She opined that part of the recourse for the legislature is to hold a committee hearing. She offered to follow up with the requested information.

[2:30:37 PM](#)

CO-CHAIR FIELDS added that he does not know whether an administration in state history has ever refused to participate in a wide series of legislative hearings on different oversight issues. He opined that it is a "middle finger" to the very

notion of the balance of power and government between the executive, legislative, and judicial branches. Regarding a protest appeal, he questioned whether it's normal for a subordinate of a commissioner to defy to protest on a bid where the commissioner was involved in the original RFP.

MR. JACKSON opined that it is a conflict of interest; however, he said he is unaware of a deputy commissioner fulfilling the role of a commissioner in the process of ruling on a protest denial. He said Alaska statutes place that duty in the hands of the commissioner.

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CO-CHAIR FIELDS asked who normally writes the prior experience clause in a typical procurement process.

MR. JACKSON stated that the prior experience clause is ordinarily developed by the entity requesting the service, such as a department or subagency; however, the statewide procurement agency would have some role in questioning and refining those specifications.

CO-CHAIR FIELDS asked who the project manager was for this particular RFP.

MR. JACKSON answered Commissioner Tshibaka.

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CO-CHAIR FIELDS asked what how the language in the prior experience clause affects the process.

MR. JACKSON said the prior experience clause is specifically used to determine whether a potential bidder is worth taking the time and making the effort to evaluate. If a bidder fails the prior experience clause, the evaluator never considers them again, which is why it is essential that the requirements in the prior experience clause have the least amount of restriction possible. He opined that in this case, that clause was specifically used to eliminate competition.

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CO-CHAIR FIELDS surmised that several aspects of the contract were unusual: firstly, potential bidders had to pay a substantial sum of money to be a member of an unrelated

organization, the NGA; secondly, there was a 25-year prior experience threshold; thirdly, the commissioner had a high level of involvement. He asked if that is correct.

MR. JACKSON answered yes. He reiterated that everything wrong with the procurement is contained within the prior experience clause.

CO-CHAIR FIELDS inquired as to the recourse for a procurement officer when an RFP is so unduly restrictive that only one potential bidder can bid.

MR. JACKSON said he faced that problem many times during his time as a contractor and facilities manager. He explained that the usual solution is to cure the restrictive language and reissue the solicitation.

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CO-CHAIR FIELDS asked if Mr. Baldwin and Mr. Kopperud, two retired state employees with experience in the field of procurement, share the same concern about the 25-year prior experience threshold and NGA membership requirement in terms of inappropriately preventing competition in the contract.

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JAMES BALDWIN, Attorney, agreed with comments in the memorandum from legislative counsel, Marie Marx, on slide 14, which was properly conditioned on the ability to find out more about the procurement and other factors that related to the decision making. He opined that the appearance leads one to suspect that there was intent to restrict the number of firms that could qualify to make an offer. Furthermore, he pointed out that there is a protection for both sealed proposal procurements and seal bid contracts, which prohibits overly restrictive terms in the solicitation. Those protections are important to protect the interests of the public by ensuring the contracts are not contrary to the public interest. After reviewing the DOA's decision on the protest filed by BDO, he expressed concern with the decision making regarding the nature of the RFP qualifications. He remarked:

The only reason that they were made restrictive and non-waiverable was because the department said so. And if they're confronted with circumstances, which indicate that those conditions are not reasonable,

they can be waived. They probably should have been waived - they probably should have gone to the next phase of the contracting process [that] involves discussions, which authorizes the parties to discuss matters related to responsiveness in the various terms of the solicitation.

MR. BALDWIN encouraged the committee to examine existing law to decide whether some of the rewrites of the model procurement code should be considered in connection with Alaska law. Beyond that, he offered his assistance in helping the committee perform its duties in this regard.

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ROSS KOPPERUD, a retired assistant attorney general, also agreed with the LAA attorney's analysis and Mr. Baldwin's comments. He offered his understanding that the denial of a hearing on the grounds of responsiveness was wrong. He opined that a hearing should have been granted; additionally, that the matters used as rejection for the bid were matters of responsibility, which are curable up to the time of award. He said the particular facts of this case indicate that BDO's bid was rejected through failure to state that they would provide in-house legal services when in fact, as a matter of law, the attorney general is required to approve such a service. He said the 25-year experience requirement is generally considered a matter of responsibility, which determines whether the contractor is capable as opposed to responsiveness - a legal matter. He offered his believe that the matter was wrongfully rejected and there should have been a full hearing on the issue. Furthermore, he pointed out that in this particular proposal, legal services to be offered by a contractor is not material. He said Alaska law dictates that immaterial matters should be waived.

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CO-CHAIR FIELDS deduced that there was unusual involvement by the commissioner and staff in a rather large contract. He asked why the legislature established a model procurement code and a chief procurement officer position. Additionally, he inquired as to the importance of the procurement staff being independent of the commissioner and other political appointees.

MR. BALDWIN explained that the model procurement code contained that structure. He added that the purpose of the chief

procurement officer was to achieve some level of independence in decision making regarding policy employed in the procurement field - the idea being that there should be some separation between policy makers and those who must implement it.

2:50:58 PM

CO-CHAIR FIELDS, returning to slide 14, asked Ms. Nauman to explain why it's inappropriate for a state agency to use paid membership in an outside organization to effectively exclude bidders from participating in a process that is intended to foster competition.

MS. NAUMAN explained that the memorandum discusses the standard by which a court would judge an agency determination, such as including the NGA membership as a requirement in the RFP. She observed that one of the bidders pursued the necessary administrative steps to appeal to the Supreme Court. In the event that it did go to the Supreme Court, she opined that the court would apply a rational basis test, which determines whether the agency's decision to include this factor in the RFP is supported by fact and has a reasonable basis. She added that it's difficult to speculate whether a court would find a rationale basis for the requirement inclusion.

MS. NAUMAN continued to explain that the recourse for someone who was denied a records request on the agency's assertion that the records do not exist is specified under AS 40.25.124, which indicates that a person can appeal a final administrative order to the Superior Court. Furthermore, AS 40.25.125 read as follows:

A person having custody or control of a public record who denies, obstructs, or attempts to obstruct, or a person not having custody or control who aids or abets another person in denying, obstructing, or attempting to obstruct, the inspection of a public record subject to inspection under AS 40.25.110 or 40.25.120 may be enjoined by the superior court from denying, obstructing, or attempting to obstruct, the inspection of public records subject to inspection under AS 40.25.110 or 40.25.120. A person may seek injunctive relief under this section without exhausting the person's remedies under AS 40.25.123 - 40.25.124.

MS. NAUMAN said it appears that injunctive relief through the Superior Court or an appeal to the Superior Court is the remedy.

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CO-CHAIR FIELDS welcomed the opportunity to hear from the department to discern whether there are additional facts on the matter. He reiterated that the administration declined to attend today's hearing.

2:55:46 PM

ADJOURNMENT

There being no further business before the committee, the House State Affairs Standing Committee meeting was adjourned at [2:55] p.m.